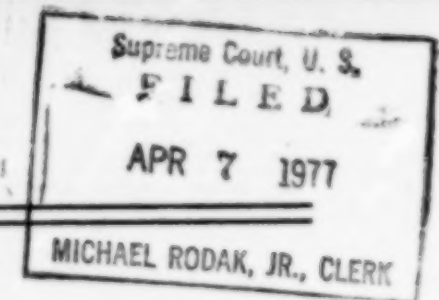


APPENDIX



Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1150

LESTER BALDWIN, RICHARD CARLSON,
JEROME J. HUSEBY, DAVID R. LEE, and
DONALD J. MORIS,

Appellants,

—v.—

FISH AND GAME COMMISSION OF THE
STATE OF MONTANA; WESLEY WOODGERD,
Director of the Department of
Fish and Game of the State of
Montana; ARTHUR HAGENSTON; WILLIS
B. JONES; JOSEPH J. KLABUNDE; W.
LESLIE PENGELLY; and ARNOLD
REIDER, Commissioners of the
Fish and Game Commission of the
State of Montana,

Appellees.

ON APPEAL FROM THE U. S. DISTRICT COURT
DISTRICT OF MONTANA
BUTTE DIVISION

FILED OCTOBER 12, 1976

PROBABLE JURISDICTION NOTED FEBRUARY 22, 1977

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

MONTANA OUTFITTERS ACTION)	
GROUP, et al.,)	
)	No. 75-80-BU
Plaintiffs,)	
-vs-)	
FISH & GAME COMMISSION OF THE)	
STATE OF MONTANA; et al.,)	
)	
Defendants.)	
-----)	

DOCKET ENTRIES IN DISTRICT COURT

<u>DATE</u>	<u>NR.</u>	<u>PROCEEDINGS</u>
6-23-75	1	Filed Civil Cover Sheet
6-23-75	2	Filed Complaint; w/request for 3 judge court and for injunctive relief, issued summons, handed original, 7 copies, 7-U.S. Marshal 285 forms to U.S. Marshal, Butte.
7-8-75	3	Filed summons with U.S. Marshal returns, all parties served June 24- July 7-1975.
7-10-75	4	Filed ANSWER of defts w/ cert. of service.
7-15-75	5	Filed Request of Pltfs. for Admission of Fact, w/cert. of service.

DATE	NR.	PROCEEDINGS
7-15-75	6	Filed Pltff's Interrog. to Defendants, w/cert. of service.
7-25-75	7	Filed Notice of Request for Statutory Three-Judge Court by Pltffs, w/cert. of mailing.
7-25-75		Del. File to Judge Murray in re request for 3 Judge Court. RET: <u>✓</u>
7-30-75	8	Filed Order of Chief Judge Russell E. Smith, certifying that this case is a proper one for a 3-Judge Fed. Court & Chief Judge of Circuit is requested to constitute such a court. Mailed copies to Counsel of record (3) and certified copy to Richard H. Chambers, Chief Judge, USCA, 9th Cir., San Francisco.
8-5-75	9	Filed Order of Chief Judge, Ninth Circuit, appointing a Three Judge Court consisting of: Hon. James R. Browning, US Circuit Judge, 9th Cir.; Hon. Russell E. Smith and Hon. Wm. J. Jameson, US Dist. Judges, Dist. of Mont. Copies mailed to counsel of record.

DATE	NR.	PROCEEDINGS
8-7-75	10	Filed Defendants Response to Request for Admissions of Fact; w/cert. of service.
8-12-75	11	Filed Defts' Answers to Interrogatories w/cert. of Serv. thereon.
8-26-75	12	Filed Order, PT Conf set for Sept. 12, 1975, at Butte. Held. Mailed copies to counsel of record (3). Mailed copy to Judge Smith, Misso.
8-28-75		Mailed copies of entire case file to Judges Jameson & Browning
9-11-75	13	Filed Pltff's Add'l Interrog. to Defendants, w/cert. of service.
9-12-75		Entire case file to Missla. Taken by Law Clerk. RET: 9-17-75.
9-17-75	14	Filed Prelim. PT Order; req. for adm. & prod. of doc. by 9-25-75; Depositions to be taken by 11-1-75; PT Attys conf. on or before 11-10-75; all discovery closed as of 11-1-75; copies of all experts to be exchanged; PT Order due 11-20-75, & in re

<u>DATE</u>	<u>NR.</u>	<u>PROCEEDINGS</u>
		exhibits, with except of X-rays, Ct. expects exhibits intended to be used to be filed with PT Order; Ans. & Obj. to all discovery requests shall be filed w/in time allowed by law; Motions to compel discovery shall be filed w/in 10 da. aft. obj. are made or refusals given & may be supported by brief as necessary; if brief is filed, opposing party shall have 5 da. to reply; discovery matters will be submitted without oral argument. Mailed copies to counsel of record on 9-18-75 (3).
9-30-75	15	Filed Order extending time to file & serve Requests for Admis. & Interrogs until 10-3-75. Mailed copies to counsel (3).
10-1-75		Mailed copies of documents #10 through 15, incl., to Judges Browning & Jameson.
10-6-75	16	Filed Deft's. Request for Admissions; w/cert. of mailing thereon; mailed copy to Judges Browning & Jameson.

<u>DATE</u>	<u>NR.</u>	<u>PROCEEDINGS</u>
10-6-75	17	Filed Interrogatories to Plaintiffs; w/cert. of mailing thereon; mailed copy to Judges Browning & Jameson.
10-14-75	18	Filed Deft's. Answers to Additional Interrogatories; w/cert. of mailing thereon. Mailed copy to Judges Browning & Jameson.
10-15-75	19	Filed Deposition of Wesley Woodgerd
10-20-75	20	Filed Notice of Taking Depositions, mailed copies to Judges Browning & Jameson, on Oct. 28 & 29 at Helena, Mt. w/cert. of service.
10-23-75	21	Filed Motion of Plaintiffs for Order Compelling Discovery & Memorandum in Support, w/cert. of service. Mailed copies to Judges Browning & Jameson.
10-23-75		Lodged proposed Order requiring party to ans. Interrog. Mailed Motion (Doc. # 2k) & proposed Order to Judge Smith, Msla.

<u>DATE</u>	<u>NR.</u>	<u>PROCEEDINGS</u>
10-29-75		Case file to RES, Msla, 11-11-75
11-3-75	22	Filed Motion of International Association of Game, Fish & Conservation Commissioners for leave to appear as Amicus Curiae. Lodged proposed Order. Mailed Motion & proposed Order to Judge Smith at Great Falls.
11-10-75		Entered Order, case is set for Hearing at Msla., MT., on 11-11-75 at 1:30 P.M. Parties notified by Judge Smith's Law Clerk. (This case had previously been set for hearing by Judge Smith at Great Falls on 11-10-75).
11-6-75	23	Filed Pltfs' Answer to Request for Admissions; w/ cert. of service thereon.
11-10-75		Mailed copies of document #23 to Judges Browning & Jameson.
11-10-75	24	Filed Order that The International Association of Game, Fish & Conservation Commissioners is hereby

<u>DATE</u>	<u>NR.</u>	<u>PROCEEDINGS</u>
		granted leave to appear in this Court as Amicus Curiae by filing a brief Amicus Curiae with this Court at an appropriate stage of this proceeding in support of its interest in this cause. Said Association may apply to this Court for leave to further appear in this cause circumstances may deem appropriate. Mailed copies to counsel of record (3) and copies to Judges Browning and Jameson.
11-10-75		Mailed documents 22, 23 & 24 to Judge Smith, Msla. to be placed in case file.
11-11-75	25	Filed Plaintiffs' Answers to Interrogatories of Defendants. Mailed Orig. Document to Judge Smith, Msla. to be placed in case file.
11-13-75	26	Filed Order that pltfs. will supply defts w/report of Melinda Schall by 11-21-75; defts have until 12-10-75 to depose M. Schall; defts. have until

DATE	NR.	PROCEEDINGS
		12-1-75 to supply pltfs. w/names of witnesses they intend to call; pltfs have until 12-10-75 to depose those witnesses & any persons quoted in deposition of William Long; parties shall submit proposed affidavits by 12-10-75 and prior to 12-20-75 advised opponent whether affidavits will be stipulated admissible; parties to hold p.t. conf. before 12-20-75 & will on that date submit a P.T. Order in conformity w/Rule 11; evidentiary hearing will be held on 12-29-75, 9:30 a.m., Msla and P.T. Order to stipulate that one judge may preside over such hearing. Mailed copies to counsel of record (3) and Judges Browning & Jameson.
11-20-75	27	Filed Deposition of Don L. Brown.
11-20-75	28	Filed Deposition of Orville Lewis.

DATE	NR.	PROCEEDINGS
11-20-75	29	Filed Deposition of Bill Long.
11-24-75	30	Filed Defts' Supplemental Responses to Pltffs' Interrogatories.
11-25-75		Mailed copies of document #30 to Judges Browning & Jameson.
12-17-75	31	Filed Deposition of Malinda Schaill, Ph.D.
12-22-75		Mailed case file to Missoula for hearing. RETURNED: <input checked="" type="checkbox"/>
12-23-75		Issued 10 Sub. to testify, behalf of defendant.
12-23-75	32	Filed Deposition of Michael D. Copeland. Mailed to Msla. to be placed in file.
12-24-75	33	Filed Pre-trial Order. Judge Smith's secretary mailed copy to Judge Jameson and notified parties that we must have another copy, Rule 21. (Took to Msla. for hearing).
12-29-75		Mailed copy of P.T. Order to Judge Browning.
12-29-75	34	Filed Defts' Memorandum for Evidentiary Hearing.
12-29-75		Ent. rec. of proc. - Trial 1 day. Parties stip. that

<u>DATE</u>	<u>NR.</u>	<u>PROCEEDINGS</u>
		proc. be heard 1 Judge only; Ct. leaves pltfs' case open for purpose of establ. pltfs standing; pltfs. asked leave to depose Minn. pltfs, upon defts' obj. rul. res; Deft. moved to dism. Compl. & pltfs' case, Ct. res. rul. until motions can be argued before 3- Judge Ct.
12-30-75		Ent. rec. of proc. - Trial 1 day. Parties stip. to Answ. by plfts. to Interrog. re. number of members in Mont. Outfitters Action Group be entered as evidence.
12-31-75		Ent. rec. of proc. - Trial 2 hrs. Defts. renewed Mos. to Dismiss, rul. res. for 3-Judge panel; evidence closed w/exception of named pltfs, which persons to be deposed in Helena by 1-23-76; parties directed to order transcript and counsel al- lowed use of copies, costs to be shared equally; parties shall, by 3-1-76, present briefs simult. and

<u>DATE</u>	<u>NR.</u>	<u>PROCEEDINGS</u>
		reply briefs by 3-15-76. Hearing set before 3-Judge Ct. 3-29-76, 10:00 a.m., Blgs and matter to be finally submitted that date.
12-31-75	35	Filed Notice of Hearing be- fore Three-Judge Court 3-29-76, 10:00 a.m., Billings. Mailed copies to counsel (4); Clerk, G.F. & Blgs., U.S.M., Blgs., Judges Smith, Jameson and Browning.
12-31-75		Delivered File and Exhibits to T. Canaan, Ct. Reporter. RET'D: 8/20/76.
1-6-76	36	Filed Notice of Depositions of David R. Lee and Donald J. Moris, at 1:30 P.M. on 1-16-76 in Helena, MT., w/cert. of service thereon.
1-13-76		Mailed copies of document 36 to Judges Browning, Smith and Jameson. Mailed Orig. document to Judge Smith to be put in case file.
2-12-76	37	Filed Motion of Mont. Out- fitters & Guides Association for leave to appear as Amicus Curiae, w/cert. of

<u>DATE</u>	<u>NR.</u>	<u>PROCEEDINGS</u>
		mailing.
2-12-76	38	Filed ORDER, Montana Outfitters & Guides Association is granted leave to appear as Amicus Curiae by filing Brief Amicus Curiae with this Court, said brief to be filed & served on or before Mar. 1, 1976; said Association may apply to Court for leave to further appear in this cause as circumstances may deem appropriate. Mailed copies to counsel and also counsel for Mont. Outfitters & Guides Assoc. (6). By telephone call to firm of Garlington, Lohn & Robinson requested 2 additional copies of Motion filed this date for Judges Browning & Jameson.
2-19-76		Mailed copies of Motion of Mont. Outfitters & Guides Assn. for leave to appear as Amicus Curiae to Judges Browning & Jameson.
2-24-76	39	Filed Deposition of Donald J. Moris.

<u>DATE</u>	<u>NR.</u>	<u>PROCEEDINGS</u>
2-25-76	40	Filed Deposition of David R. Lee.
3-2-76	41	Filed Original and 3 copies of Brief of Montana Outfitters & Guides Association, Amicus Curiae.
3-3-76	42	Filed Original and 2 copies of Brief of Plaintiffs; w/cert. of service thereon.
3-3-76	43	Filed Original and 2 copies of Brief of Amicus Curiae International Association of Game, Fish & Conservation Commissioners; w/cert. of service thereon.
3-5-76	44	Filed Original and 2 copies of Defts' Post-Hearing Brief; w/cert. of mailing thereon.
3-8-76	45	Filed copy of Garlington, Lohn & Robinson's letter to Lynn G. Foster in re postponement of present discovery schedule.
3-8-76		Copy of document #44 mailed to Judge Jameson by Judge Smith's Secretary.
3-8-76		Mailed documents 41 through 45 to Judge Smith, Ms. to be placed in case file.
3-9-76		Mailed copies of documents

<u>DATE</u>	<u>NR.</u>	<u>PROCEEDINGS</u>
		41 through 44 to Judge Browning; San Francisco.
3-9-76		Mailed copies of documents 41 through 43 to Judge Jameson; Billings.
3-17-76	46	Filed Reply Brief of Plaintiffs, w/cert. of service. Mailed copies to Judges Browning and Jameson.
3-17-76	47	Filed Defendants' Reply Brief, w/cert of service. Mailed copies to Judges Browning & Jameson.
3-17-76		Mailed documents Nos. 46 & 47 to Judge Smith for case file.
3-29-76		Entered Record of Hearing before 3 Judge Court, Judges, Browning, Smith & Jameson, at Billings, Mt.; Deft. moved to dismiss; deft. moved for entry of judgment in favor of deft. after argument of counsel, matter taken under advisement.
7-1-76	48	Filed court reporter's steno notes dated 12/29/75 (T. Canaan)
7-1-76	49	Filed court reporter's steno notes date 3/1/76 (T. Canaan)

<u>DATE</u>	<u>NR.</u>	<u>PROCEEDINGS</u>
8-12-76	50	Filed Opinion ordering judgment be entered denying pltfs. all relief w/dissenting opinion of Judge Browning attached and certificate of Judge Smith that Judge Jameson concurs. Mailed copies to counsel of record (6) and Judges Browning and Jameson. Opinion also overrules all of the State's Objections to introduction of evidence, which were reserved. Judgment/Order Book, Vol. 10, pg. 399.
8-12-76	51	Filed and entered Judgment on Decision by the Court that pltfs are denied all relief. Mailed copies to counsel of record (6) and Judges Browning and Jameson. Judgment/Order Book, Vol. 10, pg. 415.
8-20-76	52	Filed Transcript of Evidentiary Hearing, Vol. I, II, III.
9-17-76		Released Tr. of Evidentiary Hearing to James Goetz, for period of 1 week. Returned:

<u>DATE</u>	<u>NR.</u>	<u>PROCEEDINGS</u>
		9-28-76.
10-8-76	53	Filed Notice of Appeal by Montana Outfitters Group, Lester Baldwin, Richard Carlson, Jerome J. Huseby, David R. Lee, Donald J. Moris, Plaintiffs, to Supreme Court of the United States.
10-14-76		Mailed certified copies to Clerk, Supreme Court of U. S., Wash. DC and to James Goetz, counsel for Pltff; mailed copies to remaining counsel including counsel for amicus curiae. Total copies 8.
10-20-76		By telephone advised counsel for Appellant that Bond on Appeal is required.
11-3-76	54	Filed letter setting forth title of case in U.S. Supreme Court and referring to request by pltfs. to proceed in forma pauperis.
10-26-76	55	Filed the Appellees' designation of record on appeal.
3-4-77	56	Filed Cert. copy of ORDER of Supreme Court of US noting probable jurisdiction

<u>DATE</u>	<u>NR.</u>	<u>PROCEEDINGS</u>
		in this case. (Supreme Court will further direct Clerk of US Dist. Court when record is to be transmitted to Sup. Court.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

MONTANA OUTFITTERS ACTION)	
GROUP, LESTER BALDWIN, RICHARD)	
CARLSON, JEROME J. HUSEBY,)	
DAVID R. LEE, and DONALD J.)	
MORIS,)	
)	
Plaintiffs,)	No.
)	
-vs-)	75-80-BU
)	
FISH AND GAME COMMISSION OF THE)	
STATE OF MONTANA; WESLEY WOODGERD,)	
Director of the Department of)	
Fish and Game of the State of)	
Montana; ARTHUR HAGENSTON; WILLIS)	
B. JONES; JOSEPH J. KLABUNDE; W.)	
LESLIE PENGELLY; and ARNOLD)	
RIEDER, Commissioners of the)	
Fish and Game Commission of the)	
State of Montana,)	
)	
Defendants.)	

COMPLAINT

COME NOW the Plaintiffs in the above-entitled action and allege as follows:

1. This is a proceeding for a preliminary and permanent injunction, and a declaratory judgment, restraining the enforcement, operation, and execution of Section 26-202.1, Revised Codes of Montana (1947), effective March 5, 1973, and of Section 26-202.1, Revised Codes of Montana (1947), as amended by Senate Bill No. 236, effective May 1, 1976, as violative of Article IV, Section 2,

and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.

2. JURISDICTION:

Jurisdiction of this Court is invoked under 28 U.S.C., §1343, this being a suit in equity authorized by law, 42 U.S.C. §1983, to be commenced by any citizen of the United States or other person within the jurisdiction thereof to redress the deprivation under color of statute, ordinance, regulation, custom or usage of a state of rights, privileges, and immunities secured by the Constitution and Laws of the United States. The rights, privileges and immunities sought herein to be redressed are those secured by Article IV, Section 2, and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.

Jurisdiction is further invoked under 28 U.S.C. §2281, this being a suit for preliminary and permanent injunction restraining the enforcement and execution of Section 26-202.1, Revised Codes of Montana (1947), effective March 5, 1973, and of Section 26-202.1, Revised Codes of Montana (1947, as amended by Senate Bill No. 236, effective May 1, 1976, and requiring the convening of a three (3) Judge Federal Court.

Jurisdiction is further invoked under

28 U.S.C. §§2201 and 2202, this being a suit for a declaratory judgment, declaring the unconstitutionality of Section 26-202.1, Revised Codes of Montana (1947) effective March 5, 1973, and of Section 26-202.1, Revised Codes of Montana (1947), as amended by Senate Bill No. 236, effective May 1, 1976.

3. Plaintiff, Montana Outfitters Action Group, whose address is Harrison, Montana, is an unincorporated organization comprised of outfitters, hunting guides, hunters, fishermen, and outdoor sportsmen. There are approximately fourteen (14) members of Plaintiff organization, approximately seven (7) whom are professional, licensed hunting guides; individual members of Plaintiff organization hunt and guide in the State of Montana, particularly in the southwestern part of Montana, primarily in Beaverhead, Madison, and Gallatin Counties; some of the individual members of the Plaintiff organization are non-residents and therefore must pay a non-resident-related fee to the State of Montana for a license to hunt within the State of Montana, the members of Plaintiff organization who are licensed are dependent in such guiding business almost wholly on non-resident clientele. Individual members of Plaintiff organization are each adversely

affected by the discriminatory, high fees established and enforced for non-resident hunters by the Defendants; because of such discriminatory, high non-resident fees, the businesses of individual outfitters who are members of Plaintiff organization have and will continue to be adversely affected.

4. Plaintiff, Lester Baldwin, is an outfitter licensed to operate as a hunting guide in the State of Montana. His address is P. O. Box 118, Melrose, Montana. He was licensed by the State of Montana in 1969 and has earned a substantial part of his livelihood ever since as a professional outfitter. His clientele is almost wholly non-resident and they hunt almost solely for elk. He guides primarily in Madison and Gallatin Counties; his business has been, and continues to be, adversely affected by the discriminatory practices of Defendants herein-after complained of.

5. Plaintiff, Richard Carlson, is a resident of St. Paul, Minnesota, who has hunted in Montana primarily for elk by archery during the years 1969-1974; Plaintiff, Jerome J. Huseby, is a resident of St. Paul, Minnesota, who has hunted in Montana primarily for elk by archery during the years 1969-1972, and 1974; both Plaintiffs, Carlson and Huseby, have hunted for deer in addition to elk,

primarily for the reason that, in order to hunt elk, they had to buy a combination non-resident license which also included deer; Plaintiff, David R. Lee, is a resident of Maplewood, Minnesota, who has hunted in Montana only for elk, by rifle and by archery, during the years 1969-1974; Plaintiff Lee was required to purchase a combination license in each of these years in order to hunt only elk; Plaintiff, Donald J. Moris, is a resident of Lake Elmo, Minnesota, who has hunted only elk by archery in 1969, and 1970, and bighorn sheep by rifle in 1974; in each of these years, Plaintiff Moris was required to purchase a combination license even though he hunted only elk two years and bighorn sheep in the other year.

6. Defendant, the Fish and Game Commission of the State of Montana (hereinafter Commission), was created by Section 82A-2004, Revised Codes of Montana (1947), for the welfare of the fish, game and wildlife of the State of Montana. The commission is the department head of the Department of Fish and Game of the State of Montana, Revised Codes of Montana (1947), Section 82A-2001. Its five (5) members are appointed by the Governor of the State of Montana, and are responsible for enforcement and

implementation of Section 82A-2001, et seq., Revised Codes of Montana (1947).

7. Defendant, Wesley Woodgerd, is the Director of the Department of Fish and Game of the State of Montana, by statute (Revised Codes of Montana, 1947, Section 82A-2003), and as such is the chief administrative officer responsible for the enforcement and implementation of said statute.

8. Defendants, Arthur Hagenston, Willis B. Jones, Joseph J. Klabunde, W. Leslie Pengelly, and Arnold Rieder, are members of the Fish and Game Commission of the State of Montana.

9. Each and all of the acts of the Defendants alleged herein were done by defendants and each of them under the color and pretense of the statutes, ordinances, regulations, customs and usages of the State of Montana, and under the authority of their offices or color of their offices as Director of the Department of Fish and Game of the State of Montana, and as members of the Fish and Game Commission of the State of Montana.

10. Revised Codes of Montana (1947), Section 26-202.1, Licenses--fees--classifications of licenses--fees and powers under licenses, effective March 5, 1973, requires licensing fees that differentiate between residents and non-residents of the State of Montana. Specific licenses must be obtained

in order to hunt specific kinds of game. In order to "pursue, hunt, shoot, and kill" one (1) deer, a resident must purchase a "Class A-3" license for a fee of Three Dollars (\$3.00); an elk, a "Class A-5" license for a fee of Three Dollars (\$3.00); a black or brown bear, a "Class A-6" license for a fee of Five Dollars (\$5.00). In order to purchase any of these licenses, a resident must first have purchased a "Conservation License" for a fee of One Dollar (\$1.00).

Non-residents must purchase a "Class B-2" combination license for a fee of One Hundred Fifty Dollars (\$150.00), in order to hunt game animals in designated areas. A non-resident who wishes to hunt only deer may do so by purchasing a "Class B-5" license for Thirty-five Dollars (\$35.00). As a condition of purchasing any license, the non-resident must first have purchased a "Conservation License" for a fee of One Dollar (\$1.00).

Therefore, if a non-resident hunter wishes to be entitled to kill one (1) deer, the licensing fees are Thirty-six Dollars (\$36.00), compared to Four and 00/100 Dollars (\$4.00) for a resident.

And, if a non-resident hunter wishes to hunt elk or bear, he is required to purchase a "Class B-2" combination license for

One Hundred Fifty Dollars (\$150.00) plus One Dollar (\$1.00) for a Conservation License. Separate licenses for elk and bear are not available to the non-resident hunter. He must purchase the combination license to be permitted to hunt either elk or bear, and to hunt bear, he must purchase an additional special license for Thirty-five Dollars (\$35.00).

Thus, the fee schedules may be summarized as follows:

	RESIDENT	NON-RESIDENT	RATIO
One deer	\$4.00	\$36.00	9:1
One elk	\$4.00	\$151.00	37:1
One bear	\$6.00	\$186.00	31:1
One of each	\$12.00	\$186.00	15:1

11. Revised Codes of Montana (1947), Section 26-202.1, as amended by Senate Bill No. 236, effective May 1, 1976, also differentiates between residents and non-residents. Residents are still permitted to purchase individual deer, elk and bear licenses, costing Six Dollars (\$6.00), Eight Dollars (\$8.00) and Six Dollars (\$6.00), respectively. The conservation license is still a prerequisite. Copy of S.B.No. 236, attached hereto.

In order for a non-resident to purchase most individual game animal licenses, he must first purchase a "Class B-2" combination license for a fee of Fifty Dollars (\$50.00),

and a conservation license. However, he may purchase an individual deer license, "Class B-5" for Fifty Dollars (\$50.00) entitling him to kill one (1) deer, without purchasing a "Class B-2" license.

But, in order to hunt elk, a non-resident must purchase a "Class B-10 Non-resident Big Game Combination License", for a fee of Two Hundred Twenty-five and 00/100 Dollars (\$225.00). This fee includes the required conservation license and entitles him to hunt one (1) deer, elk, and one (1) bear. To hunt only bear, a non-resident must purchase a "Class B-2" combination license, a conservation license, and a special license for bear, for Fifty Dollars (\$50.00).

Thus, the fee schedules as of May 1, 1976, may be summarized as follows:

	<u>RESIDENT</u>	<u>NON-RESIDENT</u>	<u>RATIO</u>
One deer	\$7.00	\$51.00	7:1
One elk	\$9.00	\$225.00	25:1
One bear	\$7.00	\$101.00	14:1
One of each	\$21.00	\$225.00	11:1

12. The statutes herein challenged require licensing fees that differentiate between residents and non-residents in order to hunt any and all types of game.

13. The statutes herein challenged require non-residents to purchase combination licenses as a prerequisite to hunting certain

types of game, while imposing no such requirement on residents. The effect of requiring a combination license is the imposition of significantly higher hunting fees on non-residents.

14. The statutes requiring a differential between resident and non-resident licensing fees of the magnitude and type complained of, have, in fact, no rational basis.

15. The statutes herein challenged deprive Plaintiffs of rights, privileges, and immunities guaranteed by Article IV, Section 2, and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983.

16. By reason of the Laws, policies and practices herein complained of, Plaintiffs have suffered and will continue to suffer immediate irreparable injury. Plaintiffs have no adequate or available remedy other than this action for a declaratory judgment and injunctive relief.

WHEREFORE, Plaintiffs pray that the Court, as may appear proper, and convenient:

1. Issue a preliminary injunction enjoining the Defendants, their agents, and those persons acting in concert with them from enforcing the complained of provisions of Section 26-202.1, Revised Codes of Montana

(1947), effective March 5, 1973, and Section 26-202.1, Revised Codes of Montana (1947, as amended by Senate Bill No. 236, effective May 1, 1976, or otherwise denying Plaintiffs their rights secured by Article IV, Section 2 and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.

2. Convene a three (3) Judge District Court, as required by 28 U.S.C. §§2281 and 2284.

3. Enter a judgment or decree declaring that the complained of provisions of Section 26-202.1, Revised Codes of Montana (1947, effective March 5, 1973, and Section 26-202.1, Revised Codes of Montana (1947), as amended by Senate Bill No. 236, effective May 1, 1976, are void as repugnant to Article IV, Section 2 and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.

4. Permanently enjoin the Defendants, their agents, employees, successors, and all persons acting in concert and participating with them from enforcing the complained of provisions of the statutes referred to hereinabove, or otherwise denying Plaintiffs their rights secured by Article IV, Section 2 and the Due Process and Equal Protection clauses of the Fourteenth Amendment of the

United States Constitution.

5. Grant the non-resident Plaintiffs the equitable remedy of reimbursement for fees already paid as required by the complained of differential fees, subject to the right of the State of Montana to collect reasonable additional fees from the non-resident hunters which are reasonably related to the additional costs of enforcement of the State Fish and Game laws and of contribution to conservation programs.

6. Allow Plaintiffs their costs herein, attorney's fees, and grant such other and further relief as it may deem proper.

Dated this 20th day of June, 1975.

/s/ James H. Goetz
JAMES H. GOETZ
15 South Tracy, Suite 8
Bozeman, Montana 59715
Attorney for Plaintiffs

UNITED STATES OF AMERICA)
State of Montana) ss.

I, FRANK MURRAY, Secretary of State of the State of Montana, do hereby certify that the following is a true and correct copy of SENATE BILL NO. 236, Chapter No. 546, Montana Session Laws of 1975, enacted by the Forty-fourth Legislature of the State of Montana, approved by Thomas L. Judge, Governor of said State, on the thirteenth day of May, 1975, and effective May 1, 1976.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the great Seal of said State.

Done at the City of Helena, the Capital of said State, this sixteenth day of May, 1975.

/s/ Frank Murray
Frank Murray
Secretary of State

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CHAPTER NO. 546

MONTANA SESSION LAWS 1975

SENATE BILL NO. 236

AN ACT TO AMEND SECTION 26-202.1, R.C.M. 1947, TO PROVIDE A FEE INCREASE IN THE RESIDENT AND NONRESIDENT HUNTING LICENSES;

TO CHANGE THE CLASS B-2 NONRESIDENT BIG GAME LICENSE TO CLASS B-2 NONRESIDENT COMBINATION BIRD AND FISH LICENSE AND MAKE IT A PREREQUISITE TO PURCHASE HUNTING TAGS; TO PROVIDE FOR CLASSIFICATION OF NONRESIDENT DEER TAGS; TO PROVIDE FOR B-10 NONRESIDENT BIG GAME COMBINATION LICENSES SOLD IN A LICENSE YEAR; TO LIMIT THE TOTAL NUMBER OF NONRESIDENT BIG GAME COMBINATION LICENSES SOLD IN A LICENSE YEAR; TO INCLUDE THE NONRESIDENT CONSERVATION LICENSE AS PART OF THE CLASS B-2 LICENSE AND THE RESIDENT CONSERVATION LICENSE AS PART OF THE CLASS AAA LICENSE; TO GIVE THE COMMISSION AUTHORITY TO LIMIT THE NUMBER OF LICENSES SOLD IN DESIGNATED HUNTING DISTRICTS; TO PROVIDE A FEE FOR SPECIAL ELK AND DEER DRAWINGS; TO PROVIDE FOR A SPECIAL NONGAME CERTIFICATE; AND TO PROVIDE A DELAYED EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 26-202.1, R.C.M. 1947, is amended to read as follows:

"26-202.1. Licenses -- fees -- classifications of licenses -- fees and powers under licenses. (1) Class A License-- Resident Fishing License. Any resident as defined by section 26-202.3, upon payment of a fee of five dollars (\$5) shall receive a Class A license which shall entitle

the holder thereof to fish with hook and line or rod as authorized by regulations of the commission.

(2) Class A-1 license--Resident Game Bird License. Except as herein provided, any resident as defined by section 26-202.3, who is twelve (12) years of age or older, may, upon payment of a fee of four dollars (\$4) receive a Class A-1 license, which will entitle the holder to pursue, hunt, shoot and kill game birds and possess the dead bodies of game birds which are so authorized by regulations of the commission.

(a) No hunting licenses shall be issued to any resident person under the age of eighteen (18) years unless he presents to the person authorized to issue such license a certificate of competency as provided by this section.

The department of fish and game shall provide for a course of instruction in the safe handling of firearms and for the purpose may cooperate with any reputable association or organization having as one of its objectives the promotion of safety in the handling of firearms. The department may designate any person found by it to be competent to give instructions in the handling of firearms. A person so appointed shall give such course of instruction and upon the successful completion thereof

shall issue to the person instructed a certificate of competency in the safe handling of firearms.

(3) Class A-2 License--Special Bow and Arrow License. A holder of any one of the following: a Class A-3, A-4, A-5, B-2, B-5, B-6, B-7, B-8, or B-10 license, may upon payment of an additional sum of six dollars (\$6) to any agent of the fish and game commission authorized to issue fishing and hunting licenses be entitled to a Class A-2 license, which shall authorize the holder thereof to pursue, hunt, shoot, and kill the game animals authorized by the licenses held with bow and arrow and to possess these carcasses during special seasons, and in special areas, as may be designated by the fish and game commission.

(4) Class A-3, A-4, A-5, A-6 Licenses. Any resident as defined by section 26-202.3 who is twelve (12) years of age or older, may upon payment of the proper fee or fees be entitled to purchase one each of the following licenses: Class A-3, Deer A Tag, six dollars (\$6) (for the license year beginning May 1, 1976), and seven dollars (\$7) for each license year thereafter; Class A-4, Deer B Tag, twelve dollars (\$12); Class A-5 Elk Tag, eight dollars (\$8); Class A-6, Black or Brown Bear Tag, six dollars (\$6); which will entitle the holder to pursue, hunt,

shoot, and kill the game animal or animals authorized by the license held and to possess the dead bodies of game animals of the state which are so authorized by the regulation of the commission.

(5) Class B License--Nonresident Fishing License. Any person not a resident as defined in section 26-202.3, upon payment of the sum of twenty dollars (\$20) to any agent of the fish and game commission authorized to issue fishing and hunting licenses, shall be entitled to a Class B license, which shall entitle the holder thereof to fish with hook and line as authorized by the rules and regulations of the commission.

(6) Class B-1 License--Nonresident Game Bird License. Except as herein provided, any person not a resident as defined in section 26-202.3, but who is twelve (12) years of age or older, upon payment of the sum of thirty dollars (\$30) to any agent of the fish and game commission authorized to issue fishing and hunting licenses shall be entitled to a Class B-1 license, which shall entitle the holder thereof to pursue, hunt, shoot, kill and possess game birds as authorized by the rules and regulations of the commission.

No hunting licenses shall be issued to

any nonresident person under the age of eighteen (18) years unless he presents to the person authorized to issue such license a certificate of competency as provided in section 26-202.1(2)(a) or a certificate verifying that he has successfully completed a course in the safe handling of firearms in any state or province.

(7) Class B-2 License--Nonresident Combination License. Within the limitations of this section or any commission rule, any person not a resident as defined in section 26-202.3, but who is twelve (12) years of age or older, upon the payment of fifty dollars (\$50) may apply to the fish and game office, Helena, Montana for a Class B-2 license, and nonresident conservation license as prescribed in section 26-230, which shall authorize the holder to pursue, hunt, shoot, kill and possess game birds, and to fish with hook and line as authorized by the rules and regulations of the commission, and to purchase additional and special licenses and tags as provided by law or commission regulation.

(8) Class B-3 License--Temporary Nonresident or Tourist Fishing License. Any person not a resident as defined in section 26-202.3, upon payment of the sum of ten dollars (\$10) to any agent of the fish and

game commission authorized to issue fishing and hunting licenses, shall be entitled to a temporary nonresident fishing license, which shall authorize the holder to fish with hook and line as authorized by the rules and regulations of the fish and game commission for a period of six (6) days inclusive of the dates indicated on the license.

(9) Class B-5 License--Nonresident Deer License. Any person not a resident as defined in section 26-202.3, but who is twelve (12) years of age or older and a holder of a nonresident conservation license, upon the payment of the sum of fifty dollars (\$50) shall be entitled to a Class B-5 license which shall authorize the holder to pursue, hunt, shoot, and kill one (1) deer in the area or areas designated in the license, as determined by the commission, and to possess the carcass of same.

(10) Class B-6 License--Nonresident Antelope License. Any person not a resident as defined in section 26-202.3, but who is twelve (12) years of age or older and a holder of a Class B-2 nonresident combination license, upon the payment of the sum of fifty dollars (\$50) shall be entitled to a Class B-6 license which shall authorize the holder to pursue, hunt, shoot, and kill one (1) antelope in the area designated in the

license, as determined by the commission, and to possess the carcass of same.

(11) Class B-7 and B-8 Licenses. Any person not a resident as defined in section 26-202.3, but who is twelve (12) years of age or older, and is a holder of a B-2 nonresident combination license, may upon payment of the proper fee or fees and subject to the limitations prescribed by law and commission regulation be entitled to apply to the Fish and Game Office, Helena, Montana, to purchase one each of the following licenses: Class B-7, Deer A Tag, fifty dollars (\$50); Class B-8, Deer B Tag, fifty dollars (\$50); and will entitle the holder to pursue, hunt, shoot, and kill the game animal or animals authorized by the license held and to possess the dead bodies of game animals of the state which are so authorized by the regulations of the commission.

(12) B-10 nonresident big game combination license. Any person not a resident as defined in section 26-202.3, R.C.M., 1947, but who is twelve (12) years of age or older may, upon payment of the proper fee or fees and subject to the limitations prescribed by law and commission regulation, be entitled to apply to the fish and game office, Helena, Montana, to purchase a B-10 nonresident big game combination license for two hundred

twenty-five dollars (\$225) which shall entitle the holder to all the privileges of a B-2 nonresident combination license, a deer A tag, and elk tag and a black bear license. This license includes the nonresident conservation license as prescribed in section 26-230, R.C.M. 1947.

(13) Special licenses. Any applicant who is twelve (12) years of age or older and is a resident as defined by section 26-202.3, or any applicant who is the holder of a Class B-2 nonresident combination license may apply for a special license, which in the judgment of the fish and game commission, is to be issued and shall pay the following fees therefor:

Moose, resident twenty-five dollars (\$25), nonresident one hundred twenty-five dollars (\$125);

Mountain Goat, resident fifteen dollars (\$15), nonresident seventy-five dollars (\$75);

Mountain Sheep, resident twenty-five dollars (\$25), nonresident one hundred twenty-five dollars (\$125);

Antelope, resident five dollars (\$5);

Grizzly Bear, resident twenty-five dollars (\$25), nonresident one hundred twenty-five dollars (\$125);

Black or brown bear, nonresident fifty dollars (\$50).

In the event a holder of a valid special grizzly bear license kills a grizzly bear, he must purchase a trophy license for a fee of twenty-five dollars (\$25) within ten (10) days after date of kill. Such trophy license shall authorize the holder to possess and transport said trophy.

In the event that the number of valid resident applications for licenses exceeds the number of licenses which the fish and game commission desires to issue in any hunting district, then the number of licenses issued to nonresident license holders in that hunting district shall not exceed ten per cent (10%) of the total issued.

(14) Class C License--Trapper's License. Any resident as defined in section 26-202.3, upon making application and paying the sum of ten dollars (\$10) to the fish and game commission, shall be entitled to a trapper's license, which shall authorize the holder thereof to trap fur-bearing animals, within the state of Montana at such times and in such manner as may be lawful so to do under the laws of the state, and the regulations of the fish and game commission, and at such places as may be designated in said license.

(15) Class C-1 License--Landowner's Trapping License. Any owner or tenant, or

member of the immediate family of said owner or tenant, upon making application to the fish and game commission, and upon payment of the sum of one dollar (\$1) shall be entitled to a landowner's trapping license which shall entitle the holder thereof to trap any fur-bearing animal, except beaver, on land owned or leased by him, or his immediate family, at such times and in such manner as may be lawful so to do under the laws of the state and the regulations of the fish and game commission and at such places as may be designated in said licenses.

(16) Exception. (a) A resident under the definition of section 26-202.3, who is sixty-two (62) years or older shall be entitled to fish and hunt game birds with a pioneer license issued by the state fish and game commission for a fee of fifteen cents (\$.15). The form of such license shall be prescribed by the fish and game commission.

(b) Residents of all institutions under the jurisdiction of the state board of institutions, except the Montana state prison at Deer Lodge, will be entitled to fish without a license. Such residents shall carry a permit on a form prescribed by the commission and signed by the superintendent of the institution in lieu of a license.

(c) A veteran who is a patient residing at a hospital operated by the veterans

administration, within or outside the state, may fish with a license issued by the head of the hospital on forms prescribed and furnished by the commission. The fee for such license shall be fifteen cents (\$.15).

(d) If a person is convicted of a violation of the fish and game laws or regulations of Montana, the privilege conferred by this subsection shall be revoked for not less than six (6) months.

(e) Residents, as defined by section 26-202.3, under the age of fifteen (15) years may purchase Class A-1, A-3, and A-5 licenses at two dollars (\$2) per license.

(f) The commission, by rule or regulation, may prescribe the number of Class B-5 and B-6, B-7, B-8, or B-10 licenses to be issued in each of the hunting districts designated by it. Any license sold may be restricted to a specific hunting area and may specify the species, age, and sex to be taken in order to insure the proper management and propagation of game animals in these areas, provided, however, that no number limit shall be placed on B-7, B-8 and B-10 license by area except in major hunter concentration areas as determined by the commission. Not more than seventeen thousand (17,000) nonresident big game combination licenses (B-10) may be sold in any one license year.

(g) Special antelope licenses. In the event the number of valid applications for special antelope licenses for a hunting district exceeds the quota set by the commission for the district, such licenses shall be awarded by a drawing. Persons making valid application who did not receive an antelope license during the season immediately preceding the drawing shall be given first preference in such drawing for first, second and third choice hunting districts. The commission shall have the authority to promulgate such rules and regulations as are necessary to implement this subsection.

(17) Only one (1) license of any one (1) class, except Class B-3 and B-4 licenses, shall be issued to any one (1) person, provided, however, that the commission may prescribe rules and regulations for the issuance or sale of a replacement license of the same class in the event the original license is lost, stolen or destroyed upon payment of the sum of one dollar (\$1).

(18) Class AAA License--Sportsman's License. Any resident, as defined by section 26-202.3, who is twelve (12) years of age or older, upon payment of the sum of thirty-five dollars (\$35) shall be entitled to a sportsman's license which shall permit

the holder to exercise all rights granted to holders of Class A, A-1, A-3, A-5, A-6 and resident conservation licenses as prescribed in section 26-230. The commission shall furnish each holder of a sportsman's license an appropriate decal.

(19) Class D-1 License--Nonresident Mountain Lion License. Any person not a resident as defined in section 26-202.3, but who is twelve (12) years of age or older and a holder of a nonresident Class B-2 combination license, upon payment of the sum of twenty-five dollars (\$25) to any agent of the fish and game commission authorized to issue fishing and hunting licenses shall be entitled to a Class D-1 license, which shall entitle the holder thereof to pursue, hunt, shoot, kill and possess mountain lion as authorized by the rules and regulations of the commission.

(20) Class D-2 License--Resident Mountain Lion License. Any person who is a resident as defined in section 26-202.3, and who is twelve (12) years of age or older, upon payment of the sum of five dollars (\$5) to any agent of the fish and game commission authorized to issue fishing and hunting licenses shall be entitled to a Class D-2 license, which shall entitle the holder thereof to pursue, hunt, shoot, kill and possess mountain lion as authorized by the rules and

regulations of the commission.

(21) Special elk or deer licenses.

(a) Any person who is the holder of a valid resident elk license or a Class B-10 non-resident big game combination license may apply for a special elk license upon payment of a fee of one dollar (\$1).

(b) Any person who is the holder of a valid resident deer license or any nonresident who holds a Class B-2 license and a valid deer tag may apply for a special deer license upon payment of a fee of one dollar (\$1).

(c) The commission shall have the authority to promulgate such rules and regulations as are necessary to implement this subsection.

Section 2. There is a new R.C.M. section numbered 26-202.7 that reads as follows:

26-202.7. Special elk permits -- power of commission. (1) The commission may:

(a) provide for the refund of resident elk tag license fees to persons applying for special elk permits in hunting districts where there is no general elk hunting, and may set time limits and describe area restrictions;

(b) designate special elk permit areas where priority will be given to applicants who have not held special elk permits for a period of years to be determined by the

commission.

(2) The commission may adopt rules necessary to implement this section.

Section 3. There is a new R.C.M. section numbered 26-202.8 that reads as follows:

26-202.8. Nongame certificate. (1) In order to promote the preservation and management of nongame wildlife within the state, the commission may issue a nongame certificate or window decal indicating that the holders of the certificates are supporting the natural resource interests of the state of Montana.

(2) The form of the certificates or window decals shall be determined by the commission and the inscription upon it shall indicate that no hunting, fishing or trapping privilege is thereby conferred.

(3) These certificates shall be sold for an annual fee of five dollars (\$5).

(4) The proceeds collected from the sale of the certificates shall be deposited in the fish and game fund and be expended for the management, preservation, and propagation of all species of nongame wildlife in the state of Montana.

Section 4. This act shall be effective May 1, 1976.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

MONTANA OUTFITTERS ACTION GROUP,)
LESTER BALDWIN, RICHARD CARLSON,)
JEROME J. HUSEBY, DAVID R. LEE,)
and DONALD J. MORIS,) Civil No.
Plaintiffs,) 75-80-BU

-vs-

FISH AND GAME COMMISSION OF THE)
STATE OF MONTANA; WESLEY WOOD-)
GERD, Director of the Department)
of Fish and Game of the State of)
Montana; ARTHUR HAGENSTON;)
WILLIS B. JONES; JOSEPH J.)
KLABUNDE; W. LESLIE PENGELLY;)
and ARNOLD RIEDER, Commissioners)
of the Fish and Game Commission)
of the State of Montana,)
Defendants.)

ANSWER

Come now the Defendants FISH AND GAME
COMMISSION OF THE STATE OF MONTANA; WESLEY
WOODGERD, Director of the Department of Fish
and Game of the State of Montana; ARTHUR
HAGENSTON; WILLIS B. JONES; JOSEPH J.
KLABUNDE; W. LESLIE PENGELLY; and ARNOLD
RIEDER, Commissioners of the Fish and Game
Commission of the State of Montana, and
state their answer to the Complaint on file
herein as follows:

FIRST DEFENSE

Defendants move to dismiss the complaint

of plaintiff, Montana Outfitters Action
Group, upon the grounds that:

A. The complaint fails to state a claim
against these defendants upon which relief
can be granted to the said plaintiff.

B. The said plaintiff has no capacity
to sue or to be a party herein or to obtain
relief prayed for in the complaint.

C. This court has no jurisdiction over
cause purported to be alleged by this plain-
tiff.

SECOND DEFENSE

Defendants move to dismiss the complaint
of plaintiff, Lester Baldwin, upon the
grounds that:

A. The complaint fails to state a claim
against these defendants upon which relief
can be granted to the said plaintiff.

B. This court has no jurisdiction over
cause purported to be alleged by this plain-
tiff.

THIRD DEFENSE

Defendants move to dismiss the complaint
of plaintiff, Richard Carlson, upon the
grounds that:

A. The Complaint fails to state a claim
against these defendants upon which relief
can be granted to the said plaintiff.

B. This court has no jurisdiction over
cause purported to be alleged by this plain-
tiff.

FOURTH DEFENSE

Defendants move to dismiss the complaint of plaintiff, Jerome J. Huseby, upon the grounds that:

A. The complaint fails to state a claim against these defendants upon which relief can be granted to the said plaintiff.

B. This court has no jurisdiction over cause purported to be alleged by this plaintiff.

FIFTH DEFENSE

Defendants move to dismiss the complaint of plaintiff, David R. Lee, upon the grounds that:

A. The complaint fails to state a claim against these defendants upon which relief can be granted to said plaintiff.

B. This court has no jurisdiction over cause purported to be alleged by this plaintiff.

SIXTH DEFENSE

Defendants move to dismiss the complaint of plaintiff, Donald J. Moris, upon the grounds that:

A. The complaint fails to state a claim against these defendants upon which relief can be granted to said plaintiff.

B. This court has no jurisdiction over cause purported to be alleged by this plaintiff.

SEVENTH DEFENSE

The State of Montana is an indispensable party defendant.

EIGHTH DEFENSE

Any issues, questions or claims to relief relating to the law and statutes of the State of Montana as the same were in force and effect during the period beginning March 5, 1973 and ending on date of the filing of complaint herein are moot and subject to no reimbursement or declaration as to validity herein because, in addition to other defenses set forth herein, the defenses are alleged hereunder:

A. That as allegations are stated in complaint, no case or controversy exists; and

B. If the fees, as alleged, were paid they were paid voluntarily; and

C. Issues as to injunction are moot.

NINTH DEFENSE

The court has no jurisdiction to grant the relief prayed for in paragraph 5 of the complaint, or any thereof, under the allegations of this complaint or otherwise.

TENTH DEFENSE

Section 26-202.1, Revised Codes of Montana (1947), as amended by Senate Bill No. 236 is not in force and effect as of time of filing of complaint herein.

ELEVENTH DEFENSE

Defendants deny that in any event plaintiffs' attorneys' costs and fees are justified or lawful herein.

TWELFTH DEFENSE

Defendants deny and admit as follows:

A. Defendants deny the allegations of paragraphs 1 and 2 of the complaint.

B. Defendants admit that the Montana Outfitters Action Group is an unincorporated organization; but, otherwise, defendants deny the allegations of paragraph 3 of the complaint.

C. Deny the allegations of paragraphs 4 and 5 of said complaint.

D. Admit the allegations of paragraphs 6, 7, and 8 of the said complaint.

E. Deny allegations of paragraph 9 of said complaint.

F. Deny the allegations of paragraphs 10 to 16, inclusive of said complaint.

THIRTEENTH DEFENSE

That the complaint does not allege matters sufficient to constitute a cause for injunction or declaratory relief.

WHEREFORE these defendants pray that the complaint of each and all parties plaintiff herein be dismissed; that plaintiffs be denied the relief prayed for in the complaint and all thereof; that no injunction issue herein; and for decree sustaining

validity of the statutes of the state of Montana insofar as the same are attacked by complaint on file herein; and for such further relief to defendants as the court may deem proper in the premises.

Dated this 9th day of July, 1975.

ROBERT WOODAHL, Attorney
General, State of Montana

CLAYTON R. HERRON
Special Assistant Attorney
General

307 Horsky Block
P. O. Box 783
Helena, Montana 59601

By /s/ CLAYTON R. HERRON
Attorneys for Defendants.

I, CLAYTON R. HERRON, one of the attorneys for the defendants in the above entitled action, hereby certifies that on this 9th day of July, 1975, I served a true copy of the foregoing "Answer" upon attorney of record for plaintiffs, by depositing a copy in the United States mail, postpaid, addressed to JAMES H. GOETZ, 15 South Tracy, Suite 8, Bozeman, Montana 59715.

/s/ CLAYTON R. HERRON
CLAYTON R. HERRON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

MONTANA OUTFITTERS ACTION)
GROUP, et al.,)
Plaintiffs,) CIVIL NO.
-vs-) 75-80-BU
FISH AND GAME COMMISSION OF)
THE STATE OF MONTANA, et al.,)
Defendants.)

PRE-TRIAL ORDER

AGREED FACTS

The following facts are true and require no proof:

1. Section 26-202.1, Revised Codes of Montana (1947), Licenses--fees--classifications of licenses--fees and powers under licenses, effective March 5, 1973, requires higher licensing fees for non-resident hunters than for resident hunters in the State of Montana.

2. Licensing fee for non-resident hunters is higher than that for resident hunters in the State of Montana for each and every type of game license, except for bow-hunting and wild turkey, under the provisions of Section 26-202.1, Revised Codes of Montana (1947).

3. Under Section 26-202.1, Revised Codes

of Montana (1947), effective March 5, 1973, in order for a resident to "pursue, hunt, shoot, and kill" one (1) deer, he or she must purchase a "Class A-3" license for Three Dollars (\$3.00); one (1) elk, a "Class A-5" license for Three Dollars (\$3.00); and a black or brown bear, a "Class A-6" license for Five Dollars (\$5.00).

4. A resident hunter must purchase for One Dollar (\$1.00), a conservation license before purchasing any tags of licenses for specific game, except in those cases in which the resident hunter purchases a "sportsmen's license."

5. A non-resident hunter must purchase a "Class B-5" license for Thirty-five Dollars (\$35.00) in order to "pursue, hunt, shoot, and kill" one (1) deer, under the provisions of Section 26-202.1, Revised Codes of Montana (1947), effective March 5, 1973. A non-resident hunter may also hunt deer with purchase of a non-resident "combination license" ("B-2").

6. A non-resident hunter must have purchased a conservation license for One Dollar (\$1.00) before purchasing any tags or licenses for specific game.

7. A non-resident hunter must purchase a "Class B-2" non-resident big game license, for One Hundred Fifty Dollars (\$150.00) in order to hunt any and all big game animals,

except deer and antelope, under the provisions of Section 26-202.1, Revised Codes of Montana (1947), effective March 5, 1973, except that an additional exception exists under Section 26-202.5, Revised Codes of Montana (1947), for "spring bear."

8. In order to hunt elk or bear (with the exception of "spring bear"); a non-resident must purchase a "Class B-2" license and a conservation license, under the provisions of Section 26-202.1, Revised Codes of Montana (1947), effective March 5, 1973.

9. Section 26-202.1, Revised Codes of Montana (1947), as amended by the 1975 Montana Legislature (effective May 1, 1976) also differentiates between resident and non-resident hunters.

10. Under Section 26-202.1, Revised Codes of Montana (1947) (effective May 1, 1976), residents will still be permitted to purchase individual deer, elk, and bear licenses, costing Six Dollars (\$6.00), Eight Dollars (\$8.00), and Six Dollars (\$6.00), respectively. A second deer tag can be purchased by a resident under such law for a Twelve Dollar (\$12.00) fee.

11. The purchase of a conservation license for One Dollar (\$1.00) is still a prerequisite to the purchase of any

individual tags or licenses by the resident hunter pursuant to Section 26-202.1, Revised Codes of Montana (1947), as amended, effective May 1, 1976.

12. Under Section 26-202.1, Revised Codes of Montana (1947), as amended, effective May 1, 1976, in order for a non-resident to purchase most individual game licenses, he or she must first purchase a "Class B-2" combination license (which includes a conservation license) for a fee of Fifty Dollars (\$50.00).

13. A non-resident hunter may purchase an individual deer license, "Class B-5", for Fifty Dollars (\$50.00), pursuant to Section 26-202.1, Revised Codes of Montana (1947), as amended, effective May 1, 1976, entitling the non-resident hunter to kill one (1) deer, without purchasing a "Class B-2" license.

14. In order to hunt elk, a non-resident hunter must purchase a "Class E-10 Non-Resident Big Game Combination License", for a fee of Two Hundred Twenty-five Dollars (\$225.00), under the provisions of Section 26-202.1, Revised Codes of Montana (1947), as amended, effective May 1, 1976.

15. A "Class B-10 Non-Resident Big Game Combination License", provided for by Section 26-202.1, Revised Codes of Montana

(1947), as amended, effective May 1, 1976, entitled a non-resident to hunt one (1) deer, one (1) elk, and one (1) bear. Such license also includes the right to fish in Montana and hunt birds.

16. In order to hunt only bear, a non-resident must purchase a "Class B-2" combination license, a conservation license, and a special license for bear, for a total of One Hundred Dollars (\$100.00), under Section 26-202.1, Revised Codes of Montana (1947), as amended, effective May 1, 1976.

17. The area within the boundaries of the State of Montana is approximately 147,150 square miles.

18. The amount of permanent water surface within such area averages approximately 1,400 square miles and the remainder being land surface in the amount of approximately 145,750 square miles.

19. In total area, Montana ranks fourth of all the states of the United States.

20. The population of Montana in 1972 was approximately 716,000.

21. Of the fifty states in the United States, Montana ranks forty-second or lower in population and has been of the same, or approximately the same, in rank since statehood.

22. In the period from the year 1960 to 1970, the number of Montana residents hunting

within the State of Montana increased by approximately sixty-seven percent (67%) as compared with an increase of approximately five hundred thirty percent (530%) in the number of non-resident hunters within the state.

23. Per capita income for Montana residents ranks thirty-fourth in the United States for the year 1974.

24. In 1974, the average per capita income for residents of Montana was Four Thousand Seven Hundred Seventy-six Dollars (\$4,776.00).

25. Approximately thirty percent (30%) of the land in Montana is federal land.

26. Approximately seventy-five percent (75%) of the elk taken in Montana by hunters are killed on federal land.

27. Approximately eighty-five percent (85%) of the bear taken in Montana by hunters are killed on federal land.

28. A significant portion of elk habitat in the State of Montana is on federal land.

* * *

Dated this 19th day of December, 1975.

/s/ James H. Goetz
JAMES H. GOETZ
Goetz & Madden
P. O. Box 1322
Bozeman, Montana 59715
Attorneys for Plaintiffs

/s/ Clayton R. Herron
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Dated this 23rd day of December, 1976.

/s/ Russell E. Smith
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

MONTANA OUTFITTERS ACTION)
GROUP, et al.,)
Plaintiffs,) CV 75-80-BU
-vs-)
FISH AND GAME COMMISSION OF)
THE STATE OF MONTANA; et al.,)
Defendants.)

OPINION

Before: BROWNING, Circuit Judge, and SMITH
and JAMESON, District Judges

PER CURIAM:

This case is about elk and the rights of nonresidents to hunt them. The elk, once a plains animal, now lives in the mountains in central and western Montana. The elk is migratory in the sense that it moves from the summer range to the winter range and back, and when this sort of migration occurs near the borders of Montana, the elk drift to and from Montana, Idaho, Wyoming, and Canada. The summer range is in the

¹While there are disparities in the price of resident and nonresident fees for other fish and game licenses, only the combination license which permits the nonresident to hunt elk is drawn into controversy here.

mountains, and a significant part of it is federally owned. The winter range is in the foothills and valleys, a significant part of which is in private ownership. About 75% of the elk killed are killed on federal lands. The elk is not and never will be hunted commercially, It is an animal much sought for its trophy value, and nonresident hunters are as a group more interested in the trophy than are the resident hunters as a group. In recent years there has been an increase in the number of hunters and a disproportionate increase in the number of nonresident hunters. In the years between 1960 and 1970 there was an increase of 536% in nonresident hunting as compared with an increase of 67% in resident hunting.² The preservation of the elk depends upon conservation.

R.C.M., 1947 § 26-202.1(12) provides for a nonresident big game combination license and fixes the fee therefor. A nonresident may not hunt elk without the combination license. The license fee for the 1976 hunting season will be \$225.00, and for that

²All of the State's objections to the introduction of evidence, which were reserved, are now overruled.

fee the nonresident is permitted to take one elk, one deer, one black bear, upland birds, and fish. A resident³ will be able to hunt elk in 1976 by the payment of \$8.00 for an elk tag⁴ and \$1.00 for a conservation license.⁵

While a resident is not required to buy any combination of licenses, the cost to him of all of the privileges granted by the nonresident combination license would be \$30.00.⁶

³R.C.M. 1947 § 26-202.3(2) provides:

"Any person who has been a resident of the state of Montana, as defined in section 83-303, for a period of six (6) months immediately prior to making application for said license shall be eligible to receive a resident hunting or fishing license."

R.C.M. 1947 § 83-303 provides:

"Every person has, in law, a residence. In determining the place of residence the following rules are to be observed:

1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose...."

⁴R.C.M. 1947 § 26-202.1(4).

⁵R.C.M. 1947 § 26-230.

⁶R.C.M. 1947 § 26-202.1 (1), (2), and (4), and R.C.M. 1947 § 26-230.

The ratio is, therefor, 7.5 to 1 in favor of the resident. The claim is that these licensing provisions are discriminatory and in violation of the privileges and immunities clause (art. IV, § 2) and the equal protection and due process clauses (amend. XIV) of the United States Constitution. Plaintiffs concede that the State may constitutionally charge nonresidents more for hunting and fishing privileges than residents because residents, through taxes other than hunting and fishing license fees, contribute to the wildlife management program, but urge that the degree of the disparity cannot be justified on a cost basis. While no records are kept which precisely disclose the direct and indirect costs which properly may be apportioned between residents and nonresidents, the plaintiffs did offer the opinion evidence of an economist to the effect that a ratio of no more than 2.5 to 1 can be justified costwise. On a consideration of that evidence, the State's evidence opposing it, and with due regard to the presumption of constitutionality, we find that the ratio of 7.5 to 1 cannot be justified on any basis of cost

allocation.⁷

Defendants challenge the plaintiffs' standing. The plaintiffs Moris and Lee are nonresidents who have hunted for elk in Montana in the past and who want to hunt in Montana in the future. They are obviously adversely affected by an increase in nonresident license fees and have standing to maintain this action. The economic interests of Moris and Lee are affected, and that is sufficient. Sierra Club v. Morton, 405 U.S. 727 (1972). Since all issues are presented by Moris and Lee, we do not pass upon the

⁷ For a nonresident who wanted to hunt and hunted elk, and elk alone, the ratio is 28.2 to 1. Some part of the difference between the 28.2 to 1 and the 7.5 to 1 ratios may be justified by arguments made in support of the combination license, but, in view of our determination that the fee discrimination at a 7.5 to 1 ratio is not justified costwise, we approach the legal problems involved without resolving the arguments pro and con as to whether the discrimination caused by the combination license is justified.

standing of the remaining plaintiffs.⁸

Defendants suggest that there is no justiciable controversy because the law governing the 1976 hunting season will not be effective until July 1, 1976; the 1975 hunting season is over, and the law governing it cannot affect the plaintiffs.⁹ The problems here raised are those which are "'capable of repetition, yet evading

⁸The plaintiffs are four nonresident hunters, one licensed outfitter, and the Montana Outfitters Action Group, composed of seven licensed outfitters and seven dude ranchers and nonresident hunters. Amicus curiae briefs supporting the validity of the statute were filed by the Montana Outfitters and Guides Association, representing 123 outfitters, and by the International Association of Game, Fish and Conservation Commissioners, representing the wildlife agencies of all 50 states, Canada, Puerto Rico, and Mexico.

⁹While we do not consider the law governing the 1975 hunting season (R.C.M. 1947 §26-202.1) as it existed prior to the 1975 amendments (Laws of Montana 1975, ch. 91, § 1, ch. 417, § 1, ch. 546, § 1) we do note that the arguments now addressed to R.C.M. 1947 §26-202.1 as it now exists are equally applicable, except perhaps in degree, to the prior law.

review.'" Roe v. Wade, 410 U.S. 113, 125 (1973). Had plaintiffs waited until July 1, 1976, to commence this action, it is unlikely that a resolution at this court level would be obtained until the 1976 hunting season was over. Absent a repeal of the challenged law, unlikely since the Montana legislature will not meet until January 1977, the plaintiffs will be affected by the present law, and there is now a controversy. We hold the controversy to be justiciable.

The State argues with some support in the authorities that the State owns the animals in their wild state in trust for the beneficial use of the citizens of the State, and that the State may do what it will with its own property.¹⁰ The

¹⁰The cases of Geer v. Connecticut, 161 U.S. 519 (1896); McCready v. Virginia, 94 U.S. 391 (1876); In re Eberle, 98 F. 295 (N.D.Ill. 1899), and some language in Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928), lend support to this view. Because of the involvement of elk with the lands of the sovereign United States, the ownership analysis is not as readily applicable to elk as it might be to the Chinese pheasant.

plaintiffs contend with some support in the authorities that "[t]he whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."¹¹ We do not here choose between the theories advanced. The State under either theory has the power to manage and conserve the elk, and to that end to make such laws and regulations as are necessary to protect and preserve it.

Whether, in that management, a discrimination between residents and nonresidents is permissible requires an examination of the claimed right, the State purpose

¹¹The quotation is from *Toomer v. Witsell*, 334 U.S. 385, 402 (1948). In *Missouri v. Holland*, 252 U.S. 416, 434 (1920), Mr. Justice Holmes said, "To put the claim of the State upon title is to lean upon a slender reed." This language was quoted with approval in *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410 (1948), and in *Toomer v. Witsell*, supra. All of the cases cited in this footnote were concerned with migrating fish and birds. The movement of the elk is more a drifting than a true migration.

involved, and the justifications for the discrimination.

We turn to the nature of the right asserted by the plaintiffs in this case. Not everyone may hunt elk. There are too many people and too few elk. If the elk is to survive as a species, the game herds must be managed, and a vital part of the management is the limitation of the annual kill. That limitation may be accomplished in many ways, but all of them involve in some degree a limitation upon hunter days.¹² The hunter days may be controlled by pricing the license, by conducting lotteries, by limiting the length of the seasons, and by restricting the area of the hunt. Any controlling device, by reason of its effect upon the life circumstances of a potential hunter, may deprive that hunter of any possibility of hunting elk.

Whatever word may be used to describe plaintiffs' asserted rights -- right, privilege, chance -- the asserted right

¹²Each day that one hunter is in the field is a hunter day.

is recreational in character,¹³ and except for a few residents who live in exactly the right place, is expensive recreation. Critically examined, the right asserted here is, therefore, no more than a chance to engage temporarily in a recreational activity in a sister state, and even the chance is dependent upon the willingness of the people of the sister State to manage the subject matter of the recreation -- the elk. The asserted right is not fundamental¹⁴ and is not protected as a privilege and immunity by art. IV, § 2 of the United States Constitution. United States v. Wheeler, 254 U.S. 281

¹³We believe that this is sufficient to distinguish this case from Takahashi v. Fish and Game Comm'n, supra; Toomer v. Witsell, supra; and Mullaney v. Anderson, 342 U.S. 415 (1952), all of which were concerned with the fundamental right to pursue a calling or business. In American Commuters Ass'n, Inc. v. Levitt, 279 F. Supp. 40 (S.D.N.Y. 1967), aff'd, 405 F.2d 1148 (2d Cir. 1969), the district court expressly distinguished between noncommercial fishing licenses and "commercial fishing rights involving interstate commerce." 279 F. Supp. at 48.

¹⁴See Black v. McClung, infra, at 248.

(1920); Canadian Northern Ry. v. Eggen, 252 U.S. 553 (1920); and Blake v. McClung, 172 U.S. 239 (1898).

We cannot ignore the nature of the right involved in treating the equal protection problem. If the needs for education at the primary level¹⁵ and at the college level¹⁶ do not create the fundamental sort of rights which have constitutional protection under the equal protection clause, then certainly the asserted right in this case does not have a constitutional basis and is not fundamental for equal protection purposes. There is simply no nexus between the right to hunt for sport and the right to speak, the right to vote, the right to travel, the right to pursue a calling. We are not, therefore, required to scrutinize the discrimination strictly but only to determine whether the system bears some rational relationship to legitimate State purposes.¹⁷

¹⁵San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

¹⁶Sturgis v. Washington, 368 F.Supp. 38 (W.D. Wash. 1973), aff'd, 414 U.S. 1057 (1973).

¹⁷San Antonio Independent School District v. Rodriguez, supra; Hughes v. Alexandria Scrap Corp., ___ U.S. ___, 44 U.S.L.W. 4959.

The State purpose is to restrict the number of hunter days. Any regulatory system which imposes a license fee in some sense discriminates against those who can't afford to pay it. As the fee increases, the discrimination increases. A regulatory scheme based upon a pure lottery in which a limited number of hunters were chosen would be discrimination-free, but a legislature might with some rationality¹⁸ conclude that a pure lottery open to all potential elk hunters in the United States might destroy the political motivation to Montana citizens to underwrite the elk management program in the absence of which the species

¹⁸If the conclusion is rational, the presumption of constitutionality would require us to consider it.

would disappear.¹⁹

We conclude that where the opportunity to enjoy a recreational activity is created or supported by a state, where there is no nexus between the activity and any fundamental right, and where by its very nature the activity can be enjoyed by only a

¹⁹Were a Montana resident's chances to hunt calculated purely on a population basis, Montana residents would get .34% of the elk licenses issued. On the basis of all elk licenses issued in 1973 (107,675), and the population in 1970 (Montana: 694,409; United States: 203,235,298), Montana residents would have received 366 of them ($694,409 \div 203,235,298 \times 107,675$). This figure is unrealistic because in any sort of a drawing allocating licenses, the proportion of applications from Montana to the population of Montana would exceed the proportion of applications from other states to the populations of those states. Montana residents can hunt more cheaply, and probably, because of their proximity to it, are more attracted by hunting. Even so, a legislature looking at the facts might conclude that some relatively small percentage of Montana hunters would be licensed if nonresidents and Montana residents were treated equally.

portion of those who would enjoy it, a state may prefer its residents over the residents of other states, or condition the enjoyment of the nonresident upon such terms as it sees fit.²⁰

DATED this 11th day of August, 1976.

²⁰The results reached in the cases of Geer v. Connecticut, supra, n. 10; McCready v. Virginia, supra, n. 10; In re Eberle, supra, n. 10; and State v. Kemp, 73 S.D. 458, 44 N.W. 2d 214 (1950), appeal dismissed for want of a substantial federal question, 340 U.S. 923 (1951), are in accord with the result reached here.

United States Government

MEMORANDUM

TO: CLERK OF COURT - Butte

COPIES: JUDGES BROWNING and JAMESON

FROM: JUDGE SMITH

DATE: August 11, 1976

SUBJECT: Montana Outfitters v. Fish and
Game Comm'n - CV 75-80-BU

I certify that Judge Jameson concurs with me in the attached per curiam. Please file it with Judge Browning's dissent attached.

/s/ Russell E. Smith

Russell E. Smith

United States District Judge

MONTANA OUTFITTERS ACTION
GROUP v. FISH AND GAME
COMMISSION - No. 75-80-BU

BROWNING, Circuit Judge, dissenting:

The majority recognizes that the "ownership theory" espoused in early Supreme Court opinions is denigrated in more recent pronouncements. See Toomer v. Witsell, 334 U.S. 385, 402 (1948). Also in disrepute is the "special public interest" theory occasionally advanced to justify state discrimination in favor of its own citizens in matters of "privilege" as distinguished from "right." See Sugarman v. Dougall, 413 U.S. 634, 643-45 (1975); Graham v. Richardson, 403 U.S. 365, 372-74 (1970). All that remains is the traditional Equal Protection issue: Does the higher license fee charged nonresidents for hunting elk in the state serve a legitimate state purpose?

The contention most strongly pressed by the state is that the difference in license fee serves the legitimate purpose of imposing upon nonresidents a fair share of the cost of maintaining the elk herd. As the majority finds, however, "the ratio of 7.5 to 1 [or 28.2 to 1] cannot be justified on any basis of cost allocation." The majority does not discuss the other purposes advanced by the state to support the discrimination -- implying (and I agree) that there is no

reasonable relationship between the discriminatory license fee and any of the other purposes advanced by the state. Each such justification is shown by the record to be either logically or factually unsupportable.

The majority nonetheless sustains the discrimination on a novel theory not suggested by the state or supported by any authority.*

*The majority states (note 20) that the result reached in this case is in accord with the results reached in Greer v. Connecticut, 161 U.S. 519 (1896); McCready v. Virginia, 94 U.S. 396 (1876); In re Eberle, 98 Fed. 295 (W.D. Ill. 1899); and State v. Kemp, 73 S.D. 458, 44 N.W. 2d 214 (1950), appeal dismissed for want of a substantial federal question 340 U.S. 923 (1951). As the majority notes (note 10), the first three cases rest on the "ownership theory," rejected in subsequent decisions, and, in any event, not readily applicable to elk, 75% of which are killed on federal lands. Dismissal by the Supreme Court of the appeal in State v. Kemp did not involve a ruling that the discrimination was constitutional. The statement filed in the Supreme Court in opposition to jurisdiction pointed out that violations of state statutes not claimed to be unconstitutional had occurred that were sufficient to sustain the conviction.

The ultimate state interest relied upon by the majority is the unquestionably legitimate and important one of conservation. The asserted relationship between the discriminatory license fee and conservation is not direct. The state employs discrimination, the majority suggests, to further conservation in an indirect and, in my opinion, impermissible way.

The majority holds the discrimination against nonresidents to be justified because the state might rationally conclude that if nonresidents were not discriminated against and thereby discouraged from participating in the elk hunt, the number of residents who could participate would be so small that the residents would be unwilling to maintain a vigorous conservation program. In short, an otherwise invidious discrimination against nonresidents is justified because the state may rationally consider the discrimination necessary to induce residents to support the state program required to conserve the herd.

In more general terms, the principle appears to be that the state may burden access by nonresidents to a finite local resource in order to increase the share available to residents and thereby maintain a political base within the state for

the support of state efforts to conserve the resource. Put in another way, a state may justify the constitutionality of a discriminatory statute by showing that political support by the class of people to be benefited by the discrimination is necessary in order to continue the program that benefits them.

I do not believe discrimination for such a purpose is permitted by the Equal Protection Clause.

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), involved a constitutional challenge to an Arizona statute requiring a year's residence as a condition to an indigent receiving non-emergency medical care at county expense. The state argued that "the requirement is necessary for public support" of modern and effective public medical facilities because the voters believed the requirement protected them from an influx of low-income families such facilities would otherwise attract. The Supreme Court rejected the argument, stating, "A State may not employ an invidious discrimination to sustain the political viability of its programs." 415 U.S. at 266.

The Supreme Court cited with approval Cole v. Housing Authority, 435 F. 2d 807, 812-13 (1st Cir. 1970), invalidating a

city's durational residency requirement for access to low-income housing projects. In Cole, the city argued that a durational residential requirement was "often the key to survival of [public] housing" because voters believed such a restriction to be necessary to avoid benefiting newcomers as against longtime residents. The Court of Appeals rejected this reasoning, stating, "The objective of achieving political support by discriminatory means . . . is not one which the constitution recognizes." 435 F. 2d at 813.

Memorial Hospital and Cole involved infringement of fundamental rights that could be justified only by a compelling state interest. But this does not make them inapplicable. These cases rejected justification of discrimination on political grounds because justification on such a basis is inherently inappropriate, not because the right infringed was fundamental.

A holding that discrimination by the state may be justified by showing that the state could rationally believe such discrimination was necessary to secure political support for a program in the public interest, would lead inevitably, if indirectly, to the conclusion that invidious discrimination can be justified by popular disapproval

of equal treatment. As the court said in Cole, such a rule "would rationalize discriminatory classifications which are constitutionally impermissible." 435 F. 2d at 812. Addressing essentially the same point in Memorial Hospital, the Supreme Court said: "'[p]erhaps Congress could induce wider state participation in school construction if it authorized the use of joint funds for the building of segregated schools,' but that purpose would not sustain such a scheme." 415 U.S. at 267, quoting Shapiro v. Thompson, 394 U.S. 618, 641 (1969).

The majority's rationale is at odds with the principle that constitutional rights are not subject to abrogation by majority will. As the Court said in West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1942): "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversies, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." See also Lucas v. Colorado General Assembly, 377 U.S. 713, 736 (1963).

The rule applied by the majority is impossible to limit. It would immunize even

the most arbitrary discrimination from constitutional attack whenever it could be contended reasonably that the discrimination was necessary to obtain political support for the state activity.

Access to outdoor recreation is increasingly important to our society. It is significant, for example, that the number of visitors to national and state parks doubled in the decade 1960-1970. U.S. Department of Commerce, Statistical History of the United States 1970. In fact if not in law, recreational resources constitute a vital national asset. The sentiment that state residents have a preferred claim to such resources within the state is unworthy of protection "under a Constitution which was written partly for the purpose of eradicating such provincialism." Cole v. Housing Authority, supra, 435 F. 2d at 813.

I would hold Montana's discriminatory license fee unconstitutional.

MONTANA OUTFITTERS ACTION)	
GROUP, et al.,)	
)	
Plaintiffs,)	Civil Action
)	File No.
-vs-)	
FISH AND GAME COMMISSION OF)	CV-75-80-BU
THE STATE OF MONTANA, et al.,)	
)	
Defendants.)	

JUDGMENT

This cause came on for hearing before the Court, Honorable JAMES R. BROWNING, RUSSELL E. SMITH, and WILLIAM J. JAMESON, Circuit Judge & United States District Judges, and the issues having been duly heard and a decision having been duly rendered.

It is Ordered and Adjudged that plaintiffs are denied all relief.

Dated at Butte, Montana, this 12th day of August, 1976.

JOHN E. PEDERSON
Clerk of Court

By /s/ Dora Lou Sevener
Deputy Clerk

BEST COPY AVAILABLE